

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 3426/2005

In the case between:

RSB SESELE

Applicant

and

H J STANDER

1ST Respondent

THE MATJHABENG LOCAL MUNICIPALITY

2nd

Respondent

S J LEEUW 3rd Respondent

(Executive Mayor, Matjhabeng Local Municipality)

R N PITSO

4th Respondent

(Acting Municipal Manager of Matjhabeng Local
Municipality)

M J D SIZEPHE

5th Respondent

HEARD ON:

25 AUGUST 2005

JUDGEMENT:

RAMPAI J

DELIVERED ON:

1 SEPTEMBER 2005

[1] These proceedings were initiated by way of an urgent application on Thursday the 11th August 2005 before Hattingh J. He determined the formal deadlines for the

exchange of the customary affidavits and postponed the matter to Thursday the 25th August 2005 for the hearing of argument. The relief sought is an interim interdict. The matter is apposed by all the five respondents.

- [2] The applicant is the municipal manager of Matjhabeng Local Municipality, the 2nd respondent. He was appointed on 5th December 2001. His employment contract is supposed to endure until the 4th of December 2006. The five year term contract is currently under threat of premature termination. He was effectively suspended from work on the 1 March 2005. On the 22nd March 2005 he was formally charged. He now faces several counts of misconduct. I deem it unnecessary to go into details. Apparently he denies the allegations levelled against him. Notwithstanding the suspension he continues to receive his salary.

- [3] The 2nd respondent appointed the 1st respondent to preside over the proceedings in the disciplinary tribunal and appointed the 5th respondent to prosecute. Both gentlemen were attorneys. They still practice as such at the moment. The applicant also appointed attorneys to defend him.
- [4] The matter was first set down for hearing on Wednesday the 20th March 2005. The applicant did not attend. His lawyer, Mr. M.J. Willemse informed the disciplinary tribunal that the applicant was suffering from major depression. The excuse was accepted. The hearing was postponed.
- [5] The matter was again set down for hearing on Monday the 16th May 2005. The applicant did not attend. His lawyer, Mr. C.D. Dell informed the disciplinary tribunal that his client was suffering from major depression. Again the excuse was accepted. The hearing was again postponed.

[6] The matter was set down for hearing on Monday the 4th July 2005. Once again the applicant did not attend. His lawyer, Mr. Willemse informed the disciplinary tribunal that the applicant was once again suffering from major depression. He applied for the third postponement as a result of the applicant's illness. The excuse was found unacceptable by the 5th respondent. The 5th respondent opposed the applicant's application to have the hearing postponed for the third time. The 1st respondent adjourned the proceedings to the next day for the evidence relevant to the applicant's condition to be led.

[7] On Tuesday the 5th July 2005 the applicant did not show up. However, his lawyer called Dr. Stevens, a clinical psychologist to testify on behalf of the applicant. His psychologist was then cross-examined by the 5th respondent afterwards. Certain unanswered questions remained. The 1st respondent found the psychological

testimony inconclusive. He therefore ruled that the 2nd respondent be afforded an opportunity to have the applicant examined by a psychiatrist of the 2nd respondent's choice; that the applicant's own psychiatrist and the 2nd respondent's psychiatrist should be called to testify about their findings. The proceedings were adjourned yet again. Let me point out at this juncture that it emerged during the testimony of the psychologist that the applicant's treating psychiatrist was a certain Dr. van Jaarsveld. The applicant's contention that the 1st respondent did not order him to call Dr. van Jaarsveld has no force since it cannot be reconciled with his own averment that the psychiatric evidence was required by the 1st respondent. It seems to me improbable that the 1st respondent would have required only one of the two litigants to present psychiatric evidence to the exclusion of the other. Obviously the applicant's lawyer and the 5th respondent had to liaise in order to give effect to the ruling

by the 1st respondent.

- [8] On Friday the 8th July 2005 the disciplinary tribunal resumed. The applicant was still absent. His psychiatrist, Dr. van Jaarsveld did not attend the inquiry. No explanation was given for his absence. The 2nd respondent's psychiatrist, Dr. Kwekwe, also did not attend. The 5th respondent explained the reason for his absence. The end result of all this was that for the third time in succession the disciplinary tribunal could not get the disciplinary hearing started. Again the applicant, whose health condition was questioned and probed, got away with it. In practical terms he managed, in an indirect manner, to have the disciplinary hearing postponed despite the opposition of the 5th respondent. The 1st respondent found that the applicant had not advanced a valid excusable reason for his absence at the disciplinary hearing. In a endeavour to enforce the applicant's attendance next time he ruled that the applicant's salary for

the particular month be temporarily withheld by the 2nd respondent; that the disciplinary proceedings be postponed to Monday the 8th August 2005 for hearing and that on Monday the 8th August 2005, the disciplinary hearing would get under way whether the applicant was present or not.

- [9] What happened on Monday the 8th August 2005 does not appear on papers. It may well be that the parties made some alternative arrangements to skip that seeing that the next day, Tuesday the 9th August 2005 was a public holiday. Their disciplinary tribunal convened for the fourth time for the disciplinary hearing of the applicant on Wednesday the 10th August 2005. On this occasion the applicant was present. However, the hearing again could not start. The applicant's attorney, Mr. C.M. Dell applied on behalf of the applicant that the 1st respondent should recuse himself as the disciplinary presiding officer of the

disciplinary tribunal. The 5th respondent opposed the application. The 1st respondent summarily refused the applicant's application for recusal. After the ruling, the matter stood down until the next day at the request of the applicant to enable him to seek legal opinion.

- [10] The next day on Thursday the 11th August 2005 this urgent application was launched. The purpose of this application according to the applicant is to prevent the respondent's especially the 1st respondent and the 5th respondent from proceeding with the disciplinary hearing pending the finalization of the review application he contemplates bringing in due course in order to have the 1st respondent refusal to recuse himself as the disciplinary presiding officer reversed by this court. To a certain extent the applicant has partially attained the objective in the sense that, for the fourth time in a row, the disciplinary hearing could not proceed according to plan from 10th August 2005 as scheduled.

[11] The applicant sought a rule *nisi* returnable on Thursday the 15th September 2005. By way of an interim interdict he sought a provisional order whereby:

- The 1st respondent was directed to postpone, *sine die*, the disciplinary hearing which the 2nd respondent had initiated against him.
- The five respondents were restrained from proceeding with such disciplinary proceedings pending the finalization of the review application he intended bringing against the 1st respondent for refusing to recuse himself on the 10th August 2005.
- The 2nd respondent was directed to terminate its mandate in terms of which the 5th respondent was appointed to act as a prosecutor and the 2nd respondent directed to

appoint an independent prosecutor in this disciplinary hearing.

- The applicant was directed to file his application to have the decision of the 1st respondent reviewed and set aside by no later than the 19th August 2005.
- The second respondent was directed to pay the costs of this application or alternatively the respondents were directed to pay such costs jointly and severally the one paying the others to be absolved.

As I have indicated all the respondents oppose this application.

[12] The factual matrix shows that the dispute between the parties is inextricably tied up with the reasons which induced the application for the recusal of the 1st respondent as the disciplinary presiding officer as well as the reasons which prompted the application for the removal

of the 5th respondent as the tribunal prosecutor. The reasons advanced by the applicant are largely based on the legal principles laid down in our caselaw. Naturally, I am bound to seek guidance from the relevant legal principles in my endeavours to resolve the dispute at hand.

- [13] The applicant seeks an interim relief. The requisite for an interim relief or interdict are well known. They are firstly, a *prima facie* right; secondly, an apprehension of harm; thirdly, a positive balance of convenience; and fourthly, the absence of any other ordinary remedy, vide **ERICKSON MOTORS (WELKOM) LTD v PROTEA MOTORS (WARRENTON)** 1973 (3) SA 685 (AD). The correct approach demands that those requisites should be considered in an integrated fashion in order to ascertain whether the court should exercise its discretion in favour of the applicant or not. Vide Erasmus: Superior Court Practice, page E 8 -9. I shall follow that approach in this matter.

- [14] The first requisite of an interim interdict is that an applicant must set up a *prima facie* right though open to some doubt for a temporary relief, **KNOX D'ARCY LTD & OTHERS v JAMIESON & OTHERS** 1995(2) SA 579 (WLD) at 592 H. The applicant as an accused in a disciplinary tribunal has a fundamental right to a fair disciplinary inquiry just like an accused in a criminal court of law. As an employee he is further entitled to his constitutionally entrenched right to a fair labour practice. (Vide section 23 RSA Constitution Act No. 108/1996). The right to a fair labour practice encompasses the notion of an unbiased disciplinary hearing. About the applicant's *prima facie* right there was really no disagreement between the parties. Therefore I am inclined to find that the applicant has established the first requisite of an interim interdict. Coupled to this right, of course, is the cardinal question as to whether the applicant had a right, even if it be a *prima facie* right, to have the disciplinary proceedings suspended pending the review application he intends bringing to this court.

[15] The second requisite of an interim interdict is that the applicant must establish a well-grounded apprehension of irreparable harm if the interim relief he seeks is not granted. The applicant's apprehensive complaint, in this case, is that the 1st respondent is biased. The 1st respondent has been tasked to preside over the disciplinary enquiry. An employee who is accused of any misconduct by an employer and is brought before a disciplinary tribunal is certainly at liberty to raise a protest if he or she reckons that the disciplinary presiding officer has strayed away from the acceptable parameters of impartiality and that such officer has reached a point of no return. When such a situation arises in a disciplinary tribunal it becomes imperative for the disciplinary presiding officer to consider the matter dutifully, sensitively and objectively.

[16] In the case of **MOCH v NEDTRAVEL (PTY) LTD T/A AMERICAN EXPRESS TRAVEL SERVICE** 1996(3) SA 1 AD at page 13 H – J, Heffer JA said the following about the

attitude to be adopted by a judge accused of being biased:

“A judicial officer should not be unduly sensitive and ought not to regard an application for his recusal as a personal affront. (Compare S v Bam 1972 (4) SA 41 (E) at 43G-44.) If he does, he is likely to get his judgment clouded; and, should he in a case like the present openly convey his resentment to the parties, the result will most likely be to fuel the fire of suspicion on the part of the applicant for recusal. After all, where a reasonable suspicion of bias is alleged, a Judge is primarily concerned with the perceptions of the applicant for his recusal ...”

[17] In S v RALL 1982(1) SA 828 (AD) at 831 J – 832 A, Trollip AJA, as he then was, stressed the impartial role of a judge in the following words of wisdom:

“According to the abovequoted dictum of CURLEWIS JA the Judge must ensure that 'justice is done'. It is equally important, I think, that he should also ensure that justice is seen to be done. After all, that is a fundamental principle of our law and public policy. He should therefore so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all

those who are concerned in the trial and its outcome, especially the accused.”

[18] The requisites of the test for the appearance of judicial bias were recently tabulated by Howie JA, as he then was, in the case between **S v ROBERTS** 1999 (4) SA 915 SCA at paragraph 32 read with paragraph 34. There must be a suspicion that the presiding judicial officer might, and not would, be biased; the suspicion must be that of a reasonable person in the position of the accused or the litigant; the suspicion must be based on reasonable grounds; and the suspicion is one which a reasonable person referred would, not might, have.

[19] In brief the thrust of the test is simply that the suspicion of possible bias must be reasonably grounded or founded. The mere possibility of bias apparent to a layman, would not be sufficient to warrant the recusal of a presiding judicial officer, vide Mönning *infra* at 876C. When perceptions or suspicions of partiality arise the assessment of reasonableness or otherwise of such suspicions must be

assessed bearing in mind the nature of the relationship between the feuding litigants. In the case of **BTR INDUSTRIES SA (PTY) LTD v METAL AND ALLIED WORKERS UNION** 1992 (3) SA AD 673 at 697 E – H. Hoexter JA, echoed the following words of Didcott J:

“It seems to me that, in the first place, it is of great importance to take account of the sort of litigation that was involved here. It was not the ordinary sort. It was not a dispute over a liquor licence or a motor carrier permit or town planning permission. It was not a dispute in which the tensions and antagonisms, if any, were merely those which arise pro tem, ad hoc, for the time being, between people who find themselves on opposite sides of some such dispute. We are dealing with a highly sensitive field. The relationship between management and workers in this country and many others has historically been tense and strained for much of the time. It is a relationship that is characterised by a high degree of mutual suspicion, at times of acrimony and hostility, and for understandable reasons, in that there are fundamental conflicts of interest between management and workers, or at the very least what are perceived by them as being fundamental conflicts of interests. The industrial legislation recognises all this. It recognises that this is not an area in which one easily gets people to see the

other side's point of view, that it is not an area in which one easily gets give and take, that it is an area in which people are highly partisan, in which they tend to see matters in their own interests and from their own point of view only, hardly surprisingly because the matters are matters that are basic, wages and the like on one side, profitability on the other.”

This passage aptly describes the kind of labour tension that has bedevilled the relationship between the applicant and the second respondent in the instant case. Sooner than later it has to be resolved one way or the other.

- [20] Where the suspicion of bias satisfies the legal requirements of the judicial test, the disciplinary accused's call for the recusal of the disciplinary presiding officer is based on reasonable grounds. In such a situation the disciplinary presiding officer is obliged to recuse himself or herself. Conradie J in **MöNNIG & OTHERS v COUNCIL OF REVIEWS & OTHERS** 1989 (4) SA 866 CPD at 875 J – 876 A stated that if a tribunal refuses to recuse itself it misdirects itself on the question of law and misconceives

the basis of its very jurisdiction.

°It is, therefore, a mistake of law which, even on the traditional view of the reviewability of mistakes of law, falls to be corrected. I have no doubt at all that the third respondent misdirected itself in assessing whether or not the recusal application should be granted. It failed to ask itself the one cardinal question which it was obliged to consider, namely what a reasonable litigant would think of its being seized of the trial ...”

[21] The correct approach whenever a complaint or shall I say suspicion of bias is raised during the course of any judicial proceedings or tribunal disciplinary proceedings was restated as follows:

°The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training

and experience.”

Vide **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA & OTHERS v SOUTH AFRICAN RUGBY FOOTBALL UNION & OTHERS** 1999 (4) SA 147 (CC) at 177B, per Chaskalson P, *et al.*

- [22] It must always be borne in mind that as a general rule the superior courts of our country are reluctant and indeed should be slow to intervene in untermiated proceedings in the lower courts. Such superior intervention is not generously or liberally exercised. In general such powers are limited to rare cases where grave miscarriage of justice might otherwise result if such proceedings were let to carry on until the case reaches its logical conclusion in the ordinary course of events. Vide **SITA AND ANOTHER v OLIVIER, NO, AND ANOTHER** 1967 (2) SA 442 AD at 447 E - F where Botha JA said the following:

°The normal remedy available to an accused person against a wrong decision given by an inferior court on a question of law is to

appeal to a Superior Court, but only after conviction. (See sec. 103 of the Magistrates' Courts Act, 32 of 1944). Nor will a Superior Court ordinarily interfere in such a case by way of review before a conviction has taken place in the inferior court. (See sec. 98 (4) of the Magistrates' Courts Act, and *Wahlhaus and Another v Additional F Magistrate, Johannesburg, and Another*, 1959 (3) SA 113 (AD) at p. 119). But as was pointed out in the latter case at p. 119 -

'by virtue of its inherent power to restrain illegalities in inferior courts . . .”

In **HAYSON v ADDITIONAL MAGISTRATE** 1979 (3) SA 155 CPD at 160 A – B Van Winsen J said the following:

“As a general rule a Superior Court will not by way of entertaining an application for review interfere with incompleted proceedings in an inferior court.”

[23] In **MENDES AND ANOTHER v KITCHING NO AND ANOTHER** 1996 (1) SA 259 ECD at 269 A, Kroon J said the following:

“where a magistrate presiding over a trial has incorrectly applied the law there will, generally speaking, be no room for a review, at

least while the trial is in progress.”

In **MAGISTRATE, STUTTERHEIM v MASHIYA** 2004 (5)

SA 209 SCA at paragraph 14, Cameron JA had this to say:

“The higher Courts, however, have emphasised repeatedly that the power to intervene in unconcluded proceedings in lower courts will be exercised only in cases of great rarity..”

All these decisions clearly show that a litigant involved in legal or disciplinary proceedings in the lower court has no right to suspend those proceedings midstream because he intends to take the matter on review. To justify the grant of such a postponement, vide **MOLEFE v DIHLABENG LOCAL MUNICIPALITY** 2003 (4) ALL SA 269 OPD per Hancke J.

[24] I now proceed to examine the facts to determine whether the applicant’s fear of irreparable harm to his *prim facie* right is well-grounded. The crux of the applicant’s complaint is that he has reasonable suspicion that the 1st

respondent is biased. According to the applicant he has an apprehension that he will not have a fair disciplinary hearing unless such disciplinary proceedings are stayed indefinitely pending his contemplated review application. The purpose of such review application will be to have the 1st respondent removed from the disciplinary tribunal as its disciplinary officer. It is therefore important to evaluate the applicant's reasons relating to his suspicions of the respondent's alleged bias.

- [25] According to the applicant, the mere fact that the 1st respondent on his own accord directed that the applicant salary be withheld pending the finalization of the disciplinary hearing was indicative of the 1st respondent's bias and such decision strengthened his well-grounded apprehension. This is his first ground per training to his suspicion of partiality.

The 1st respondent's contention was that he was not

precluded by clause 7.5.4 from making a decision authorising the temporary withholding of the applicant's salary. In doing so, he alleged that he was prompted by a desire to secure the attendance of the applicant so that the disciplinary hearing could start. Besides the salary he also took into consideration a number of other factors.

[26] Clause 7.5.4, annexure F empowers the disciplinary presiding officer to make certain interim arrangements including the withholding of an accused employee salary provided such an accused employee's has already been found guilty of a misconduct. As I understand, such a drastic measure is limited between two faces of the disciplinary proceedings, namely the verdict and the sanctioning. Since the disciplinary proceedings in the instant case had not yet progressed beyond the stage of a verdict, the salary of the 1st respondent could not be competently withheld. Therefore, I am of the view, that the decision of the 1st respondent was indeed unauthorised and accordingly wrong.

[27] Wrong though the decision was, it did not in my view, constitute an irregularity. Moreover, the decision did not objectively manifest itself as a biased disposition of the 1st respondent towards the applicant to justify the immediate suspension of the disciplinary proceedings or to justify the immediate review of that decision. On analysis I could find absolutely nothing fundamentally irregular about the 1st respondent's judgment as embodied in annexure E as regards the salary issue. The complaint concerning the withholding of the applicant's salary is now a matter of academic importance seeing that the applicant received his full salary and uncut benefits in any event.

[28] According to the applicant the hostile manner in which his attorney, Mr. Willemse was treated by the 1st respondent triggered the perception of bias. The complaint by the applicant that the 1st respondent was biased towards him because he constantly interrupted his lawyers during

argument and also that the 1st respondent never interrupted the 5th respondent by putting questions to him is vehemently denied by the 1st respondent and the 5th respondent.

[29] In his answering affidavit the 5th respondent averred in paragraph 7.13:

“7.13

ADD SUB PARAGRAPHS 10.22 TO 10.23 THEREOF

I note contents hereof but need to state that:

7.13.1 the suggestion that the First respondent was not willing to listen to argument by **Mr Willemse**, is wholly incorrect.

Mr Willemse alone argued for **42 minutes** on **8th July 2005** still. The First Defendant raised some issues with him during the argument which is a normal practice in all hearings. The First Respondent also put questions to me during my argument, particularly on **18th May 2005**. This ground of the perceived bias by the First Respondent has no merits. I remember specifically that I wanted to argue the point furnishing further particulars extensively on **16th**

May 2005, but the First respondent interrupted me as well and indicated that we, myself and the Applicant's legal representative, should resolve the matter of further particulars between the two of us. He then left the chambers and we discussed that matter in his absence and put on record what we all agreed about later. So if that is a ground for the Applicant to allege bias on the part of the First Respondent, then his apprehension is neither reasonable nor justifiable and it can never be, that of a reasonable, objective and well informed litigant and such apprehension stand to be rejected;"

- [30] In the replying affidavit the applicant hardly made any attempt to take this point any further. It can therefore be accepted that there is no merit in this second complaint about the perceived hostile and biased treatment of the applicant's lawyers. In the case of **TAKE & SAVE TRADING CC v STANDARD BANK OF SA LTD** 2004 (4) SA 1 SCA the participative role of a judge in court debate was considered and ventilated. Harms JA observed that a judge was not simply a silent empire and that fairness of court proceedings required of a judge to be actively

involved in the management of the trial to ensure among others, that public resources were not wasted. In *casu* a speedy finalization of the disciplinary hearing of a senior municipal employee suspended with full pay is certainly a commendable objective for the disciplinary presiding officer to pursue in order to curb a waste of public resources. Every postponement of such hearings inflates waste of public resources because such an employees continues to earn for doing nothing productive.

[31] In the instant case for instance, I read the papers in advance. I had the opportunity to digest the issues and the written submissions by the counsels. I identified the strengths and the weaknesses of each litigant's case and formed my own *prima facie* view of the matter. I hasten to add that it was a flexible and not a rigid view. The ultimate fate of the matter was not sealed before I had had the opportunity of listening to oral argument by the lawyers. During oral legal argument I actively engaged one counsel a whole lot more than the other. Whenever I did so, my

genuine aim was to exploit various or certain trends, weak or strong, in his client's case without losing balance. The number, the nature and the complexity of the weak spots identified in a case of a particular litigant are but some of the factors which may determine the duration of such a debate between a particular counsel and a particular judge. At times it becomes necessary for a judge to invite a particular counsel to address certain issues which are bothering him or her in order to have all the obscured issues ventilated.

- [32] Quite often counsel's input elicited by such a participative debate between the lawyer and the bench freshens the pack and re-aligns it with the best view. Such refreshment may, at times, be so persuasive that it swings the pendulum from the one extreme to the other extreme of the *prima facie* view initially held by a judge. A healthy debate of this kind can persuade a judge to see things differently and move him or her to rebalance the scale in accordance with the most convincing argument presented. Absolute

neutrality is an unattainable ideal. Objective impartiality is the hallmark of an unattainable unbiased mind.

[33] In the third place the applicant complained that the written reasons advanced by the 1st respondent for his judgment confirmed the disciplinary presiding officer's negative attitude towards the applicant. Those reasons, the applicant stressed, served as pure prove of the disciplinary presiding officer's biased attitude towards him. In support of this complaint counsel for the applicant then went on to enumerate several passages of the judgment. I shall consider only a few of these passages.

[34] As regards paragraph 1.10 on page 53 of the record the 1st respondent stated:

¶1.10 Op die 5de Julie 2005, het Dr Stevens inderdaad kom getuig. Sy getuienis was dat hy vir Mnr Sesele by verskeie geleenthede gesien het en dat Mnr Sesele inderdaad aan major depressie gelei het. Mnr

Sizephe het vir Dr Stevens onder kruisverhoor geneem, onder andere vanweë die feit dat daar op 'n stadium gedurende Maart 'n mediese sertifikaat uitgeskryf is, in terme waarvan Mnr Sesele van diens geplaas is, vanaf die 22ste Maart tot aan die einde van Maart 2005, terwyl die sertifikaat gedateer was die 17de Maart 2005. Dr Stevens het die tydaspek van die mediese sertifikaat probeer verduidelik deur te sê dat dit gedoen was op versoek van Mnr Sesele, maar was hy nie bereid om toe te gee dat dit 'n doelbewuste poging was van Mnr Sesele om hom te manipuleer nie.”

[35] As regards paragraph 1.15 op page 54 of the record the 1st respondent stated:

¶1.15 Mnr Sizephe het 'n stelling aan Dr Stevens gemaak dat Mnr Sesele se jongste siekte toestand in skelle kontras staan met Mnr Sesele se bereidwilligheid om op dieselfde Vrydag, as wat hy vir Dr Stevens geskakel het, met klagtes van sy depressie, gesond genoeg was om in 'n ander dissiplinêre verhoor getuienis af te lê. Dr Stevens was nie bereid om 'n mening hieroor te waag nie.”

[36] The complaints of the applicant in connection with the above two passages have no substance at all. In these passages the 1st respondent expressed no personal views and made no personal remarks whatsoever concerning the applicant. He merely summarized what transpired in the disciplinary tribunal during the cross-examination of Dr. Stevens by Mr. Sizephe, in other words, the 5th respondent, on Tuesday 5th July 2005. It was the 5th respondent's intense probe which unearthed unfavourable evidence about the applicant's alleged health condition. It was therefore, not the hostile or negative attitude of the 1st respondent which cast some doubt as to alleged ailment of the applicant. In my view, there was virtually no appearance of biased mind on the part of the 1st respondent in any of those two passages.

[37] As regards paragraph 2.3 on page 56 the 1st respondent

stated:

¶2.3 Dat Mnr Sesele tydelik ontnem sal word van sy vergoeding in 'n poging om hom te verplig om sy verhoor te staan, onder die uitdruklike voorwaarde dat indien hy onskuldig bevind word, aan al die ten laste gelegde aanklagtes, sy volledige salaris aan hom terugbetaal moet word.”

I have already dealt with this complaint. It is unnecessary to repeat myself here. Suffice to say I came to the conclusion that the 1st respondent was wrong and that he was not empowered to make such forfeiture order prematurely. However, the mere fact that he incorrectly interpreted clause 7.5.4 did not in itself portray him as a adjudicator with a biased mind.

[38] As regards paragraph 5 on page 57 the 1st respondent stated:

¶5. Ek is ongelukkig nie oortuig daarvan dat Mnr Sesele

werklik so siek is dat hy nie sy verhoor kan staan nie. By die 1ste verskyning in hierdie aangeleentheid op die 30te Maart 2005, was Mnr Sesele self teenwoordig. Ons het die geleentheid gehad om hom waar te neem, en was dit baie duidelik dat alhoewel hy met 'n siekte sertifikaat verskoon is, van sy werksverpligtinge, was hy heeltemal in staat om deel te hê aan die verrigtinge en het hy almal vriendelik gegroet, instemmend geknik wanneer daar sekere aspekte geopper is en alhoewel ons nie 'n psigiater is of onself wil voordoen as 'n psigiater nie, het ons geensins die indruk gekry dat hy te siek was om sy verhoor te kan staan nie. Dit is ook net belangrik om daarop te let dat vir elke uitstel wat hy toe daarna afwesig was, was dit as gevolg van presies dieselfde sogenaamde major depressie.”

[39] As regards paragraph 6 on page 57 the 1st respondent stated:

i°6. Ten spyte van die feit dat Dr van Jaarsveld se getuienis beskikbaar was, is daardie getuienis om een of ander rede weggehou van die tribunal. Toe die werkgewer gepoog het om Mnr Sesele se mediese toestand te verifieer, is psigiater wat vir daardie doel aangestel

was, en wat gereis het vanaf Bloemfontein eenvoudig die deur gewys. Die enigste afleiding was daaruit gemaak kan word is dat Mnr Sesele doelbewus daarop uit was om sy werklike mediese toestand te verberg.”

[40] In the foregoing passages the 1st respondent was evaluating the applicant's third application for a postponement of the disciplinary inquiry. He remarked that on Wednesday the 30th March 2005 the applicant attended the tribunal armed with a medical certificate which declared him to be suffering from a major depression. On the strength of that alleged health condition the applicant's informal request for a postponement was granted. His excuse was accepted on its face value. The 1st respondent stated that on that first day of the seating of the disciplinary tribunal, he, as a layman, was of the opinion that the applicant, ill though he was, did not project the appearance of a person so ill that he could not stand his disciplinary trial.

[41] On Monday the 4th July 2005 the applicant once again sought a postponement for the third time. The 5th respondent opposed the application. The 1st respondent ruled that a formal application be presented the next day.

On Tuesday the 5th July 2005 the applicant was once again absent as he had been on a few previous occasions. His psychologist, Dr Stevens was called to testify on his behalf. His evidence did not help the applicant's case at all. On the contrary it seriously dented the applicant's *bona fides* concerning his major depression excuse. The 1st respondent then adjourned the proceedings for three days so that psychiatric evidence could be led.

[42] The applicant did not attend. I am almost certain that the applicant was told by his lawyer, Mr. Willemse on Monday the 5th July 2005 that his illness was questioned by the 5th respondent and that the disciplinary tribunal was going to

hold a formal inquiry to consider whether or not he was so ill that he could not come to the disciplinary tribunal to defend himself against the accusations. I have reason to believe that the applicant knew from then on that his health condition would take a centre stage when the disciplinary tribunal resumed. On the 8th July 2005 no sound reason was given why the applicant's psychiatrist, Dr van Jaarsveld could not come. The applicant's application for the postponement ended on a very low note. No further evidence of any sort was led by or on behalf of the agent in a bid to combat the serious damage caused during the cross examination of Dr. Stevens. I have to mention that it was incumbent upon the applicant to prove to the disciplinary presiding officer that his health condition was so weak that he could not attend and participate at the disciplinary inquiry. It was not for the 5th respondent or the 2nd respondent or any other respondent for that matter to prove to the disciplinary tribunal that the respondent was not ill. He regrettably did not make use of that opportunity.

[43] The inexplicable failure of the applicant to tender psychiatric evidence, the frequent co-incidences between the flaring up dates of the applicant's depression and the dates allocated for the disciplinary hearings of his case, his attendance of the disciplinary tribunal hearings where he was not involved as an accused but as a witness and his alleged unwillingness to be examined by the psychiatrist of the 2nd respondent's choice cumulatively painted a bad picture about the applicant's real state of health. On the facts, therefore, the negative comments by the 1st respondent were justified.

[44] In paragraph 5 of page 57 the 1st respondent commented as follows about the applicant:

j°5. Ek is ongelukkig nie oortuig daarvan dat Mnr Sesele werklik so soek is dat hy nie sy verhoor kan staan nie. By die 1ste verskyning in hierdie aangeleentheid op die 30ste Maart 2005, was Mnr Sesele self verteenwoordig. Ons het

die geleentheid gehad om hom waar te neem, en was dit baie duidelik dat alhoewel hy met 'n siekte sertifikaat verskoon is, van sy werksverpligtinge, was hy heeltemal in staat om deel te hê aan die verrigtinge en he thy almal vriendelik gegroet, instemmend geknik wanneer daar sekere aspekte geopper is en alhoewel ons nie 'n psigiater is of onself wil voordoen as 'n psigiater ne, he tons geensins die indruk gekry dat hy te siek was om sy verhoor te kan staan nie. Dit is ook net belangrik om daarop te let dat vir elke uitstel wat hy toe daarna afwesig was, was dit as gevolg van presies dieselfde sogenaamde major depressie.”

In paragraph 6 on page 58 the 1st respondent commented as follows about the applicant:

„Ten spyte van die feit dat Dr van Jaarsveld se getuienis beskikbaar was, is daardie getuienis om een of ander rede weggehou van die tribunal.”

In my view any reasonable disciplinary presiding officer in the shoes of the 1st respondent would, on those facts,

have refused the applicant's application for a further postponement seeing that there was no objective satisfactory and credible evidence to justify the grant of such a postponement. **MOLEFE v DIHLABENG** (*supra*).

The psychologist's evidence had failed to show that the applicant was indeed suffering from major depression. The 1st respondent's remarks did not, in my view, justify the applicant's suspicion that he might not get a fair and impartial disciplinary hearing.

(vide **S v SHACKELL** 2001 (4) SA 1 SCA per Brand AJA as he then was).

[45] As regards paragraph 9.13 on page 59 the 1st respondent stated:

°Daar is ook in berekening gebring dat hierdie reëling bloot 'n tussentydse reëling is en indien dit sou gebeur dat die werkgewer om een of ander rede nie gereed is om op die 8ste Augustus 2005 voort te gaan met die verhoor nie, dan is 'n totaal ander stel feite weer voor die tribunaal en sal 'n ander praktiese reëling weer getref kan word rondom die salaries van Mnr Sesele. Dit is derhalwe ons mening dat hierdie bevinding die mees praktiese reëling sou wees, onder die

omstandighede.”

The comments I made earlier in paragraph 34 are as valid here and now as they were there and then. But I now wish to add another aspect to this salary issue. The 1st respondent never intended to deprive the applicant permanently of his salary. In terms of the 1st respondent's decision the 2nd respondent was authorised to withhold the applicant's salary for a relatively short period of time on the pay day of that particular month only. The salary deprivation order would remain operative until the 8th August 2005. It was an interim measure intended to induce the applicant to attend the disciplinary hearing before the tribunal. That the order was not renewed on the 10th August 2005 is a further indication that the 1st respondent did not harbour any partiality against the applicant. He followed the wrong way in the hope of reaching the right destination.

[46] In the case of **MOHANOE MPAKANE v TSWELOPELE MUNICIPALITY EN 2 ANDER**, case 2800/2004, unreported decision of this court, Musi J commented as follows about the adverse effects of delaying the finalization of a disciplinary hearing.

“The reasons for the need for the prompt commencement and conclusion of a disciplinary inquiry of this nature are obvious. It is of the utmost importance to both the employer and employee that there be certainty in their relationship. A state of limbo where the employee’s future is uncertain and the employer cannot fill his/her position is undesirable. In *casu*, the applicant had been earning a full monthly salary for some 8 months to July 2004 (11 months to date) whilst rendering no service at all. It is causing the first respondent considerable loss and is untenable a situation.”

I share those sentiments.

[47] There was nothing wrong with the 1st respondent’s delivery of an *ex tempore* judgment rejecting the application that he

should recuse himself. According to Mnr. Dell, he, Mr. Williams, Mr. Willemse and the applicant had the opportunity of listening to the tape recordings of the disciplinary proceedings in the disciplinary tribunal. Having done so, he and Mr. Willemse reckoned that a perception of bias was created. Both of them came to the common conclusion that they had every reason to despair, that the applicant's evidence would never be accepted as the truth by the 1st respondent in the disciplinary hearing to follow. Quite often *ex tempore* judgments or rulings are handed down in our courts of law. I know of no law which forbids such a practice. In the circumstances of this case as outlined in this judgment I am inclined to agree with the argument of counsel for the respondents that it was not only reasonable but also imperative for the disciplinary presiding officer to dismiss the application for his recusal there and then. I am not persuaded by this fourth complaint. Regrettably Mr. Dell hardly singled out one passage recorded on tape which he had which was so despairingly at variance with the 1st respondent's written

judgment as would move me to disassociate myself with the judgment. (Vide paragraph 5, page 167).

[48] As regards paragraph 26 and 27 of his affidavit on page 179 all I can say is that his plea that the transcript of the record should be obtained to show that the 5th respondent's version was absolutely incorrect was amazing, to put it mildly. He was the applicant's attorney. The applicant initiated these proceedings but he was not present when the alleged perceptions of bias were created on the 4th July 2005 or the 5th July 2005 or the 8th July 2005. The applicant and his two lawyers listened to the tape afterwards. All three of them knew that the answering affidavit of the 5th respondent and the written judgment of the 1st respondent did not jell with the tape recording of the proceedings. The applicant's replying affidavit was filed on the 18th August 2005. Yet none of them cared to obtain a transcript of the disciplinary proceedings in the disciplinary tribunal. No explanation was given as to why

such an important evidential material could not be attached either to the founding affidavit or the replying affidavit. Who then is to blame for that omission? The history of the applicant's case is pathetically characterised by a series of acts of omission. This is but only one of them.

[49] The matter was argued before me on 25th August 2005. Counsel for the applicant suggested that time was not on the applicant's side which was why a transcript did not form part of the applicant's papers. That might well have been so on 11th August 2005. But the same excuse no longer held water on 18th August 2005 when the replying affidavit was filed. The matter was argued before me on 25th August 2005, two weeks since these proceedings were launched. I got the impression that the transcript was still not available. If it was counsel for the applicant would certainly have said so. The applicant would probably have made an application to supplement his replying affidavit. No such an application was made. The apprehension of

harm flowing from the suspicion of bias was first experienced way back on 5th July 2005 or 8th July 2005 at the very latest. Therefore the decision to apply for the 1st respondent to recuse himself was not suddenly made on 10th August 2005 but long before then. The point I am making is this: there seems to be very little in the transcript for the applicant and his lawyers to bemoan its absence from the record. Unfortunately the transcript is not before me, but it appears to me that its general import is captured in the affidavits.

- [50] In **TAKE & SAVE TRADING CC v STANDARD BANK SA LTD** 2004 (4) 1 SCA at paragraph 1 per Harms JA it is recorded that the judge in the court *a quo* debated the merit of a postponement application by the defendant because it seemed to the judge that the application was nothing but a tactical move to gain time. During the course of the debate the judge moved outside the ambit of the interlocutory postponement application into the orbit of the main sphere

of the main case itself. In no uncertain terms the judge told the defendant that he thought there was little merit in two aspect of the defendant's plea. He was later asked to step down. He refused. The defendant's appeal to have the refusal set aside and the judge removed failed. Harms J held that a deadly legal point forcibly made by a judge on the substantive merits of the main case itself during the course of legal argument cannot give rise to an apprehension of bias in the eyes of the reasonable, objective and informed litigant in possession of the correct facts. In the instant the disciplinary presiding officer's remarks were expressed in connection with a medical point and not a deadly legal point. The medical point had virtually nothing to do with the merits of the main case.

- [51] The despair of the applicant's lawyer is that the applicant's version would never be accepted by the 1st respondent because, as they say, the 1st applicant has already created a perception of bias. They aver that since he had already disbelieved the applicant's claim that he was so ill that he

could not attend and participate in the disciplinary hearings since the 30th March 2005 until the 10th Augustus 2005 he would therefore never believe him in the main disciplinary inquiry still to be held. This perception is fundamentally defective. The first respondent was evaluating the evidence and the argument relating to an application for a postponement. It is so that he did not believe the evidence tendered on behalf of the applicant. He took into account a number of factors and suspected that the applicant was apparently not as ill as he wanted the disciplinary tribunal to believe. This conclusion prompted him to dismiss the applicant's application for the postponement which series of applications was beginning to manifest a defined routine of pattern. On the facts that conclusion could not be faulted.

[52] It is clear and obvious that the applicant's application on the 10th Augustus 2005 whereby he called upon the disciplinary presiding officer to recuse himself from the tribunal chair was triggered by the dismissal of his third

application for a postponement. It follows therefore that the applicant's suspicion or perception of an unfair disciplinary hearing arose during the interlocutory proceedings. At that interlocutory juncture the disciplinary tribunal was not at all concerned with the real merits of the actual dispute.

Imagine the scenario where an accused in a criminal case applies for the third postponement of his criminal trial. Let us suppose that he gives the same excuse whenever he makes an application for a postponement. The public prosecutor opposes the application. A formal application is then presented. The accused himself does not testify. His psychologist testifies on his behalf. Serious damage is done to the accused's case, not on the main merits, but on the subordinate merits of a preliminary application. In the end the magistrate rejects the accused's version because he is of the opinion that the accused fakes illness.

[53] Can a reasonable person in those circumstances come to the convincing conclusion that he or her would not have a

fair and impartial trial later because the magistrate does not believe he was ill? What reasonable prospects of success does the accused in those circumstances have if he takes the magistrate to the high court on review application because the magistrate refuses to recuse himself? In our courts accused's persons frequently loose out during the legal battle called "trial-within-a-trial". Implicit in the loss of the accuse in such a mini-trial is the inevitable conclusion that the judge does not believe the accused's version. Notwithstanding such an unfavourable finding, the legal position in our criminal system is that the judge thereafter carries on with the main trial. It happens all the time. In my view the perception of the applicant's lawyers are flawed. Needless to say that the applicant's second-hand suspicion of bias based on those flawed perceptions, therefore has no reasonable foundation.

[54] According to the applicant since the first respondent elected to oppose the present application for the postponement or suspension of the disciplinary hearing

and since the 1st respondent has filed an answering affidavit those two legal steps or adversarial acts serve as final confirmation of the well-grounded apprehension of bias the applicant perceives. This is the fourth ground of his apprehension of harm. I am not persuaded. The applicant made serious allegations against the 1st respondent. Among others, he suggested that the 1st respondent was conniving with the 5th respondent to violate his fundamental right to a fair and impartial disciplinary hearing. He sees the whole matter as a dispute between him on the one hand and the 1st and the 5th respondents on the other hand.

[55] The truth of the matter is that the real dispute is between the applicant and the 2nd respondent. Both the 1st respondent and the 5th respondent are professional people. They are not on the payroll of the 2nd respondent. No-one can expect an attorney whose professional integrity

an ethical conduct are questioned in this manner to fold his hands and to do nothing. It must be remembered that the applicant initiated this whole matter. He invited the respondents to court. He surely cannot now be alarmed when they come to the party. The host who invites guests cannot complain and label those guests trespassers when they arrive.

[56] The applicant's claim of bad motive and unethical collaboration between the 1st respondent and the 5th respondent is not only unfounded but it is absurd as well. If the 1st respondent was unethical and wanted to collaborate with the 5th respondent who was equally unethical he would have done so secretly and not openly as the applicant claims he did. This accusation too, holds no water. I cannot accept it. But it is expressly conceded by the applicant in his founding affidavit that no unethical conduct can be levelled against the 5th respondent. The applicant's reliance on the word "ons" in his judgment as

proof of sinister collaboration between the 1st respondent and the 5th respondent is a thin argument. So is the argument about the further particulars. I deem it unnecessary to deal with these grounds of the applicant's suspicion of bias.

[57] The question to be resolved now is whether the applicant has made out a case for the immediate intervention by this court midstream the tribunal process of a disciplinary inquiry.

It is so that the disciplinary hearing proper has not yet started. Therefore no evidence has been led pertaining to the merits. But so much has been placed before me concerning the material allegations of facts or the main reasons for the contemplated review that I cannot imagine what else can still be said which has not been said already. The point I am trying to make is this. The applicant could as well have brought an urgent review application if he was serious about such a legal step. The strategy of piecemeal

sudden attacks on the playground of litigation is frowned upon by our courts because it often leads to a proliferation of disputes between the litigants which could have been entertained and adjudicated simultaneously. See **SIPHO MHLAMBI v DIHLABENG LOCAL MUNICIPALITY & ANOTHER** unreported decisional in this court under case number 132/2005 and **MEYER v SESELE**, case number 3910/2004 also an unreported decision of this court.

- [58] I am inclined to agree with the contention of counsel for the respondent that if the applicant was dead serious about such a review application he could easily have filed it simultaneously with the present interdict. It was never done that way. On the papers no explanation was given why it wasn't. There seems to be substance in the respondents' contention that the omission was simply another ploy to prolong the finalization of the disciplinary hearing since the applicant has nothing to loose but everything to gain by playing for time. The applicant is a very senior functionary of the 2nd respondent. No doubt he

earns a handsome salary. The delay in finalizing this disciplinary case seriously harms the 2nd respondent and is drastically detrimental to the general interests of the community of Matjhabeng. Such prejudice can only be minimized if everyone involved gets serious about the business of putting this dispute to rest. The 1st respondent and the 5th respondent are not employees of the 2nd respondent. The 2nd respondent remunerates them. That too is an extra expense which goes to waste if they are not efficiently and effectively utilized for the purpose they were appointed.

[59] It is stride law that the applicant can only succeed with this kind of review application if he can show that the 1st respondent's refusal to recuse himself will cause him serious harm resulting in a miscarriage of justice - vide **NEWELL & CRONJE** 1985 (4) SA 692 (E). As matters stand now, and I do not see stronger facts emerging, it is clear that the applicant dismally fails to make out such a

case. Our courts have always carefully looked at the reasons advanced in support of such review.

[60] The reasons advanced by the applicant for the relief are of vital importance. Those reasons are fully set out in the founding affidavit and annexures thereto. They form the foundation of the relief sought. I was at pains to analyze them. Such reasons were drastically watered down in the answering affidavit. They could not be salvaged in the replying affidavit. Therefore the applicant's review application, in my view, will have no solid foundation. Such an application will be an exercise in futility. It is doomed to fail as I see things now. It has no reasonable prospects of success, vide **NEWELL v CRONJE** *supra*. The applicant cannot succeed unless he proves special reasons for the extra-ordinary relief he seeks, vide **MOLEFE v** **DIHLABENG LOCAL MUNICIPALITY** 2003 (4) ALL SA 269 (OPD) per Hancke J and **WELKOM VILLAGE MANAGEMENT BOARD v LETENO** 1958 (1) SA 490 AD per Ogilvie Thompson AJA.

[61] There were no special reasons advanced by the applicant. There was nothing special about those reasons that he had advanced. They were ordinary reasons. Therefore, in the absence of special reasons, I cannot depart from the general principle which guides our courts and precludes them from readily interfering with disciplinary proceedings in a disciplinary tribunal midstream. The power to intervene midstream is sparingly used. On analysis I am not moved to dispense with that salient principle.

[62] Seeing that the applicant has failed to prove the second requisite of an interim interdict, whereas the law required him to prove all the four requisites, it becomes unnecessary to deal with the remaining two requisites. This is where I sign off. This is the station of the interim interdict where I get off.

On the proven facts I have come to the conclusion: First that the 1st respondent was not unduly sensitive to the

application for his recusal and that he did not regard such an application as a personal affront which clouded his judgment. Secondly, I could detect no justification for the applicant's apprehension that the manner in which the 1st respondent presided over the disciplinary proceedings of the tribunal manifested no open-mindedness, impartiality or fairness to a reasonable litigant. Thirdly the perceived suspicion that the presiding tribunal officer might possibly be biased was not reasonable in the circumstances. Fourthly, the 1st respondent did not misdirect himself in refusing to recuse himself. Finally, the question whether a reasonable, objective and informed person would on the facts apprehend that the presiding tribunal officer will not bring an impartial mind to bear on the adjudication of must therefore be answered in the negative.

[63] As regards the 5th respondent the applicant dismally failed to make out any arguable case. He sought the permanent removal of the 5th respondent from his appointed position

as a tribunal prosecutor. He, therefore, sought a final relief.

To the extent that he sought a final interdict against the 5th respondent the dispute of facts have to be decided on the principle that the version of the 5th respondent must be accepted as the truth and be preferred to that of the applicant, vide **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** 1984 (3) SA 623 (AD).

There is no merit for the applicant's complaint against the participation of the 5th respondent in the disciplinary tribunal concerned. The applicant hopelessly failed to show in what way the participation of the 5th respondent has or could infringe his right to a fair and impartial disciplinary trial. He by-passed the 2nd respondent along the way. The procedure he followed was lamentably defective. The grounds for his application for the dismissal or removal of the 5th respondent were *frivola causa*, that is they were legally insufficient to justify the final relief he sought - vide **SOUTH AFRICAN MOTOR ACCEPTANCE**

CORPORATION v OBERHOLZER 1974 (4) SA 808 (TPD)

AT 812 C. I would therefore also refuse to grant the relief sought against the 5th respondent.

[64] The costs must follow success in this matter. I am inclined to think that there was nothing untoward about the five respondents engaging the services of two counsels. These were urgent proceedings. There was a lot at stake for the respondents, especially the 2nd respondent, and of course the 5th respondent as well as the 1st respondent. This was not a simple and straight forward matter. This was not a case where one respondent had appointed two counsels, one senior and another junior. Here we have five respondents sharing two counsels. In principle there could have been more lawyers involved. For this reason I am of the opinion that fairness demands that I direct the applicant to pay the costs of this case including the costs occasioned by the employment of two counsels who appeared for the respondents.

[65] On account of the view I took of the matter I deliberately decided to deal with the substantive merits of the case and to leave out the points raised *in limine*. If any party requires me to give written reasons in respect of the points raised *in limine* for what it may worth I shall gladly oblige. Such a request must be delivered to the registrar in writing within 14 calendar days of this judgment.

[66] Accordingly I make the following order:

66.1 The application is dismissed *in toto*.

66.2 The applicant is directed to pay the cost of the application.

66.3 The costs so payable shall include the costs occasioned by the employment of two counsels who appeared for the respondents.

M.H. RAMPAL, J

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On behalf of the respondents:

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